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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

J&G SALES, LTD,

Petitioner

v.

MICHAEL J. SULLIVAN,
ACTING DIRECTOR
BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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**Counsel of Record*

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United States District Court for the District of Arizona,
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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

J & G SALES, LTD..,	)	
	)	
Plaintiff,	)	CIV 03-2263 PCT PGR
	)	
vs.	)	**JUDGMENT**
	)	
EDGAR DOMENECH,	)	
ACTING DIRECTOR,	)	
BUREAU OF ALCOHOL	)	
TOBACCO, FIREARMS	)	
AND EXPLOSIVES,	)	
	)	
Defendant.	)	

_____

_____ **Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__x__ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS THEREFORE ORDERED AND ADJUDGED granting in part and denying in part Defendant's Motion for Summary Judgment. Judgment is entered in favor of Defendant with respect to Counts 2-6 of Plaintiff's Complaint.

Judgment is entered in favor of Plaintiff with respect to Count 1 of Plaintiff's Complaint that the demand letter is an unlawful request for its FFL records outside the scope of BATFE's statutory authority. IT IS FURTHER ORDERED that dft is enjoined from seeking to enforce its August 4, 2003 demand letter issued to Plaintiff.

Date: August 5, 2004

RICHARD H. WEARE
Clerk/DCE

/s/ L. Dixon
(By) Deputy Clerk
L. Dixon

cc: all counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

J & G Sales, LTD.,	)	
	)	
Plaintiff,	)	CV 03-2263 PCT PGR
	)	
vs.	)	ORDER
	)	
Edgar A. Domenech, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives,	)	
	)	
Defendant.	)	

Pending before the Court are Defendant's Motion for Summary Judgment (doc. 9-1) and Plaintiff's Motion to Supplement Opposition to Defendant's Motion for Summary Judgment (doc. 20- 1). The Court now rules on the motions.

I. BACKGROUND

The Gun Control Act of 1968 as amended, requires a federal firearms licensee ("FFL" or "licensee") to maintain records of gun[1] transactions as required by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE"). 18

[1] The parties use firearm and gun interchangeably throughout their pleadings.

U.S.C. §§ 921-931.[2] FFL records are used by BATFE to perform its statutory tracing responsibilities. *See* § 923(g)(1)(B)(ii)(II) and § 923(g)(7); *cf.* § 926(a) (recognizing BATFE's tracing authority).

In 2000, BATFE issued a report ("BATFE 2000 Report")[3] identifying limitations in BATFE's ability to trace new guns because of uncooperative gun dealers as well as limitations in BATFE's ability to trace secondhand guns. The report noted that more than half of all new gun traces with short times-to-crime[4] could be traced to a small class of FFLs. BATFE concluded that the fact that an FFL had a high number of traces of new crime guns with short times-to-crime may mean that the FFL is also selling a commensurate number of secondhand crime guns.

Consequently, since the BATFE 2000 Report was issued, BATFE has identified FFLs with a significant number of gun traces with short times-to-crime during the preceding

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[2] Prior to November 2002, the Secretary of the Treasury was responsible for enforcing federal gun laws. The Secretary delegated the authority to the Bureau of Alcohol, Tobacco and Firearms. The Homeland Security Act of 2002, 6 U.S.C. §§ 101 and 531, transferred the enforcement responsibility to the Attorney General who, in turn, delegated his authority to the (renamed) Bureau of Alcohol, Tobacco, Firearms and Explosives. 28 C.F.R. § 0.130(a)(1).

[3] Bureau of Alcohol, Tobacco & Firearms, Department of the Treasury, *Commerce in Firearms in the United States* (2000).

[4] Time-to-crime refers to the period of time it takes for a traced gun to move from the retailer to a crime scene. The average time-to-crime is six years. BATFE considers a time-to-crime of three years or less a short time-to-crime. *See* BAFTE's alleged fact #10, infra p. 5.

year and issued a demand letter to each FFL.[5] The demand letters required each FFL to report to BATFE a portion of the FFL's records for all secondhand guns acquired during the preceding year and thereafter on a quarterly basis. Each FFL was required to provide the following partial information regarding the secondhand gun:

1. the name of the manufacturer and/or importer;

2. the acquisition date;

3. the model;

4. the caliber or gauge; and

5. the serial number.

The demand letters warned that an FFL's failure to comply may result in administrative or criminal sanctions including revocation of the FFL's federal firearms license.

During the 2002 calendar year, BATFE traced sixteen new guns with short times-to-crime to J & G Sales, Ltd. ("J &G"), an FFL. On August 4, 2003, BATFE issued a demand letter to J&G requiring it to report partial information for all secondhand guns acquired by J&G during calendar year 2002, during the first quarter of calendar year 2003, and quarterly

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[5] The letter was issued by BATFE through its National Tracing Center Division. On February 3, 2000, the Director of BATFE delegated the authority to issue demand letters pursuant to 18 U.S.C. § 923(g)(5)(A) and 27 C.F.R. § 178.126 to the Special Agent in Charge of BATFE's National Tracing Center Division.

thereafter until directed otherwise.

On November 18, 2003, J&G filed its complaint against BATFE seeking a declaratory judgment and injunction against BATFE. The thrust of J&G's claims centers on J&G's reading of 18 U.S.C. § 923 as a complete framework: J&G argues that BATFE's authority to issue demand letters to FFLs under 18 U.S.C. § 923(g)(5) must be interpreted in the context of the other statutory provisions; consequently, BATFE's demand letter authority is tempered by the limitations of subsections of § 923 and other statutes. On the other hand, BATFE reads § 923(g)(5) in isolation, essentially contending that BATFE is authorized to issue a demand letter to an FFL to obtain record information for any purpose. Tension exists because BATFE must provide gun tracing without establishing a national gun registry. *Blaustein & Reich, Inc. v. Buckles,* 220 F. Supp. 2d 535, 536 (E.D. Va. 2002) [hereinafter *Blaustein I*], *aff'd,* 365 F.3d 281 (4th Cir. 2004) [hereinafter *Blaustein II].*

J&G seeks a declaratory judgment that the demand letter (1) is an unlawful request for its FFL records outside the scope of BATFE's statutory authority, (2) is an arbitrary and capricious agency action and thus an unlawful agency action, and (3) is in violation of J&G's rights to due process of law. In addition, J&G seeks a preliminary and permanent injunction to (1) prevent BATFE from taking any adverse action against J&G for not submitting record information to BATFE as required by the demand letter and (2) require BATFE to destroy any information already submitted to BATFE by J&G.

On January 26, 2004, BATFE filed its Motion to Dismiss or for Summary Judgment. On January 28, 2004, the Court ordered that the motion would be construed as a Motion

for Summary Judgment. J&G filed its opposition to BATFE's Motion for Summary Judgment on March 5, 2004. BATFE filed its reply to J&G's opposition on March 27, 2004.

On March 16, 2004, J&G filed Plaintiff's Motion to Supplement Opposition to Defendant's Motion for Summary Judgment. BATFE filed its opposition to J&G's motion on March 25, 2004. J&G filed its reply to BATFE's opposition on April 14, 2004.

II. LEGAL STANDARDS AND ANALYSIS

A. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Court must grant summary judgment when: (1) no genuine issues of material fact remain; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp.* v. *Catrett,* 477 U.S. 14 317, 322-23 (1986); *Eisenberg* v. *Ins. CO. DIN Am.,* 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of demonstrating that it is entitled to summary judgment. *Mur-ray Mgmt. Corp. v. Founders Title Co.,* 819 P.2d 1003, 1005 (9th Cir. 1991). If the moving party makes a prima facie showing that no genuine issue of material fact exists, then the burden shifts to the opposing party to produce sufficient competent evidence to show that a triable issue of fact remains. *Ancell* v. *United Station Assocs., Inc.,* 803 P.2d 450, 452 (9th Cir. 1990).

BATFE alleges the following facts[6] in support of its motion for summary judgment:[7]

1. The BATFE 2000 report describes how BATFE traces guns using information obtained from FFLs.

2. At the request of a law enforcement agency which recovers a gun, BATFE's National Tracing Center traces a gun from its manufacturer or importer to the first retail dealer who is asked to identify the first retail purchaser.

3. FFLs are crucial to BATFE's tracing system, a fact recognized by Congress when it required FFLs to respond within 24 hours to a BATFE tracing request in the course of a bona fide criminal investigation.

4. BATFE significantly aids law enforcement agencies in their efforts to solve crimes and detect firearms trafficking patterns; however, BATFE's tracing system has limitations.

5. One limitation is FFLs which do not keep proper records or cooperate with BATFE requests. In 1999, .1 % of FFLs did not respond, were slow to respond, or provided incorrect information to BATFE trace requests. BATFE issued demand letters to these FFLs requiring that each FFL provide

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[6] The facts alleged by BATFE in this action are, in all material respects, identical to the facts alleged by BATFE in *Blaustein & Reich, Inc.* v. *Buckles*, 220 F. Supp. 2d 535, 539-542 (E.D. Va. 2002), *affd*, 365 F.3d 281 (4th Cir. 2004) (adopting BATFE's alleged facts verbatim as findings of the court under a local court rule because the FFL did not challenge any of the alleged facts).

[7] The Court has distilled and paraphrased the parties' alleged facts.

BATFE with gun acquisition and disposition records from the previous three years and monthly thereafter until advised otherwise.

6. Another limitation is the difficulty of tracing secondhand crime guns. Because FFLs are required only to maintain records of gun acquisition and disposition, BATFE's tracing system does not easily permit tracing of guns beyond the first retail purchaser. This is a problem for the law enforcement community because more than half of BATFE's gun traces involve secondhand guns.

7. Because FFLs are required to maintain acquisition records for secondhand guns, the information necessary to easily trace secondhand guns exists. However, prior to the demand letter program at issue in this case, secondhand gun traces could not be conducted by BATFE because (1) FFLs did not routinely provide secondhand gun records to BATFE and (2) the lack of a link between first and subsequent retail transactions prevented BATFE from tracking a gun to a subsequent FFL.

8. BATFE analyzed its gun tracing data to determine the best way to obtain access to FFL secondhand gun information for BATFE' s secondhand gun traces. Although BATFE's statutory authority requires any FFL to provide record information when requested by letter, BATFE used available data to narrowly focus its data collection to collect limited information from a small class of FFLs.

9. Most new guns traced by BATFE are sold by a small class of FFLs. Slightly more than 1% of FFLs were associated with ten or more gun traces in 1998. These FFLs accounted for

more than half of BATFE's guns traces.

10. This class of FFLs can be further narrowed. Time-to-crime is the time it takes for a gun to move from the FFL retailer to a crime scene. Six years is the average time-to-crime. Three years or less is a short time-to-crime and is a trafficking indicator suggesting rapid movement of the gun to the illegal gun market. By identifying FFLs with a relatively high number of traces per year with short times-to-crime, BATFE can identify FFLs which sell guns that are ultimately used in crime. Although BATFE initially identified FFLs associated with ten or more traces per year with short times-to-crime, BATFE now identifies FFLs associated with fifteen or more traces per year with short times-to-crime.

11.The fact that an FFL sells a relatively large number of guns used in crime does not necessarily indicate any wrongful action on the part of the FFL. Nonetheless, because these FFLs are likely to sell a significant number of used guns that eventually are used in crime, by requiring these FFLs to provide BATFE with secondhand gun information, BATFE will obtain the information necessary to trace secondhand guns.

12. In response to the BATFE 2000 Report findings, BATFE decided to issue demand letters to certain FFLs requiring each FFL to provide BATFE with information from the FFL's records. BATFE required uncooperative FFLs to provide a broad scope of data regarding all guns acquired and disposed of during the preceding years, including the names of persons from whom guns were acquired or to whom guns were sold. BATFE required FFLs with fifteen or more gun traces with short times-to-crime to provide BATFE, on a quarterly basis, with a limited subset of record information consisting

only of the (1) name of the manufacturer or importer, (2) serial number, (3) model, and (4) caliber or gauge of secondhand guns acquired by the FFL from nonlicensees; BATFE instructed the FFLs not to provide the names of individuals from whom the guns were acquired or to whom the guns were sold. BATFE's demand letters explained that if an FFL had a high number of new crime gun traces with short times-to-crime, the FFL may also be selling a high volume of secondhand crime guns and that BATFE is unable to trace secondhand guns without the requested information.

13. BATFE' s records indicate that J &G was identified as the first retailer seller of fifteen or more new gun traces with short times-to-crime during 2002. Therefore, BATFE issued a demand letter to J&G requesting the information listed above for secondhand guns acquired by J&G.

14. J &G filed this action instead of complying with the demand letter.

BATFE supports its alleged facts by presenting the Administrative Record relied upon by BATFE in making its decisions.

J&G presented no additional evidence to controvert BATFE's alleged facts but disputes that the Administrative Record submitted by BATFE supports some of the facts alleged by BAFTE:[8]

2. J&G alleges BATFE receives trace requests for both

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[8] See *supra* note 7.

guns used in crime and guns obtained by law enforcement agencies for reasons not related to crime.

5. J&G alleges only .048% of FFLs did not respond, were slow to respond, or provided incorrect information to BATFE trace requests.

8. J&G disputes that BATFE has the statutory authority to require FFLs to provide detailed and extensive information when requested by BATFE.

10. J&G alleges that the Administrative Record is incomplete such that no determination can be made whether guns traced by BATFE (1) are traced in the course of bona fide criminal investigations; (2) are "crime guns"; or (3) were found at "crime scenes."

11. J&G alleges that the Administrative Record lacks support for BATFE's statement that "dealers that sell significant numbers of new guns that quickly become crime guns are likely to sell a significant number of used guns that are eventually used in crime."

13. J&G disputes that the Administrative Record is sufficiently complete to conclude that BATFE traced fifteen or more crime guns with short times-to-crime to J&G.

In addition, J&G challenges several of BATFE's alleged facts as inaccurate quotations from the Administrative Record.

The bulk of J&G's disputations of BATFE's alleged facts are irrelevant *(e.g.,* fact #2) or immaterial *(e.g.,* fact #5) for purposes of determining whether BATFE is entitled to

summary judgment. Alternatively, some of J&G's disputations call for conclusions of law *(e.g.,* fact #8). Finally, J&G's contentions that BATFE did not accurately quote the Administrative Record are misplaced insofar as BATFE's statements in its alleged facts are paraphrased or generalized conclusions, not direct quotations, from the Administrative Record *(e.g.,* facts #4,6-8).

The record supports the conclusions herein when viewed in the light most favorable to *either party.*

The statutory text is "the starting point for [the Court's] analysis" *Desert Palace, Inc.* v. *Costa,* 539 U.S. 90, 98 (2003) (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-254 (1992)). The "judicial inquiry is complete" if "the words of the statute are unambiguous." *Id.* (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. at 254 and *Rubin v. United States,* 449 U.S. 424, 430 (1981)).

> "It is [the Court's] duty 'to give effect, if possible, to every clause and word of a statute.' " *United States v. Menasche,* 348 U.S. 528, 538-539, 75 S. Ct. 513, 99 L. Ed. 615 (1955) (quoting *Montclair* v. *Ramsdell,* 107 U.S. 147,152, 2 S. Ct. 391, 27 L. Ed. 431 (1883)); *see also Williams* v. *Taylor,* 529 U.S. 362, 404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (describing this rule as a "cardinal principle of statutory construction"); *Market Co.* v. *Hoffman,* 101 U.S. 112, 115, 25 L. Ed. 782 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be

> prevented, no clause, sentence, or word shall be superfluous, void, or insignificant' "). We are thus "reluctan[t] to treat statutory terms as surplusage" in any setting. *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698,115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995); *see also Ratzlaf v. United States*, 510 U.S. 135, 140, 114 S. Ct.655, 126 L.Ed. 2d 615 (1994).

Duncan v. *Walker*, 533 U.S. 167, 174 (2001). Legislative history may not be considered if statutory text is unambiguous. *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 753 (9th Cir. 2003) (citing *Desert Palace, Inc. v. Costa*, 539 U.S. at 98; *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105,119 (2001); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)("Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" (quoting *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 240 (1989))); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.")).

An FFL must maintain "records of importation, production, shipment, receipt, sale, or other disposition of firearms . . . as [BATFE] may by regulations prescribe." 18 U.S.C. § 923(g)(1)(A).[9] However, an FFL "shall not be required to submit to [BATFE] reports and information with respect to such records and the contents thereof, except as

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[9] 27 C.F.R. §§ 478.121-478.134 identify the specific information which FFL records must contain including information to identify the gun and the transferee.

expressly required by this section." § 923(g)(l)(A).

In addition, an FFL must submit a report to BATFE and a local law enforcement agency[10] when the FFL disposes of two or more handguns to a non-licensee within any five consecutive business days. § 923(g)(3). An FFL must report the theft or loss of a firearm to BATFE and a local law enforcement agency within forty-eight hours of the discovery of the theft or loss. § 923(g)(6). An FFL must deliver all its required records to BATFE or a local law enforcement agency if the FFL discontinues its business. § 923(g)(4).

Furthermore, BATFE is authorized to inspect and examine FFL records during business hours after obtaining a warrant from a magistrate judge if BATFE has reasonable cause to believe a violation of the chapter has occurred. § 923(g)(1)(A). Alternatively, BATFE is authorized to inspect and examine FFL records without reasonable cause or a warrant:

(i) in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee;

(ii) for ensuring compliance with the record keeping requirements of this chapter-

(I) not more than once during any 12-month period; or

(II) at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee; or

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[10] The local law enforcement agency must destroy the report no more than 20 days after it is received.

(iii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

§ 923 (g)(1)(B). In addition:

> Each licensee shall respond immediately to, and in no event later than 24 hours after the receipt of, a request by [BATFE] for information contained in the records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation.

§ 923(g)(7).[11] Finally:

> Each licensee shall, when required by letter issued by [BATFE], and until notified to the contrary in writing by [BATFE], submit on a form specified by [BATFE], for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as [BATFE]

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[11] *See also* 27 C.F.R. § 478.25a:

> Each licensee shall respond immediately to, and in no event later than 24 hours after the receipt of, a request by a[ ] [BATFE] officer at the National Tracing Center for information contained in the records required to be kept by this part for determining the disposition of one or more firearms in the course of a bona fide criminal investigation.

in such letter may specify.

§ 923(g)(5)(a).[12]

Moreover, BATFE is authorized to promulgate rules and regulations to fulfill its responsibilities except that:

> No such rule or regulation prescribed after [May 19, 1986[13]] may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts [BATFE]'s authority to inquire into the disposition of any firearm in the course of a criminal

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[12] *See also* 27 C.F.R. § 478.126(a) (originally promulgated in 1968 and previously codified at 27 C.F.R. § 178.126(a):

> Each licensee shall, when required by letter issued by the Director of Industry Operations, and until notified to the contrary in writing by such officer, submit on Form 4483, Report of Firearms Transactions, for the periods and at the times specified in the letter issued by the Director of Industry Operations, all record information required by this subpart, or such lesser record information as the Director of Industry Operations in his letter may specify.

[13] The statute reads: "the date of the enactment of the Firearms Owners' Protection Act" which was May 19, 1986.

investigation.

§ 926(a). Since 1978, funds appropriated for BATFE have included this prohibition:

> [N]o funds appropriated herein shall be available for salaries or administrative expenses in connection with consolidating or centralizing, within the Department of the Treasury, the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees.

Pub. L. No. 106-554, 114 Stat. 2763 (2000).

The Court is aware of only two other cases in which the issues relevant to J&G's claims have been discussed. In 2000, BATFE issued a demand letter to an FFL under a demand letter program which targeted uncooperative FFLs.[14] The FFL challenged the demand letter as exceeding BATFE's statutory authority. After trial before the court, the court held that the demand letter issued to the FFL violated § 926(a) and granted a declaratory judgment in favor of the FFL; the court enjoined BATFE from seeking to enforce its demand letter. *RSM, Inc.* v. *Buckles*, 94 F. Supp. 2d 692 (D. Md. 2000) [hereinafter *RSM I*], *rev'd*, 254 F.3d 61 (4th Cir. 2001) [hereinafter *RSM II*]. On appeal, the Court of Appeals for the Fourth Circuit reversed the trial court's judgment, vacated the injunction, and held that the demand letter issued to the FFL was within the "grant of positive statutory authority" of § 923(g)(5) such that the

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[14] *See* BATFE's alleged fact #5, *supra* p. 5.

demand letter did not violate other statutory provisions. *RSM II* at 69.

Also in 2000, an FFL received a demand letter from BATFE essentially identical to the demand letter received by J&G.[15] The FFL challenged the demand letter in federal court alleging the same claims as J&G except for violation of due process. On motion by BATFE, the court granted summary judgment in favor of BATFE on all counts. *Blaustein I.* On appeal, the Court of Appeals for the Fourth Circuit affirmed the summary judgment. *Blaustein II* at 281.

1. Unlawful demand for records not expressly required by law and not for a bona fide criminal investigation (Count I)

J&G claims that BATFE's demand letter to J&G is an unlawful records request because the demand letter was not for the purpose of a bona fide criminal investigation. J&G argues that BATFE may request FFL records only for purposes of a bona fide criminal investigation as authorized by §§ 923(g)(l)(B) and (g)(7). J&G argues that any other records request by BATFE violates § 923(g)(1)(A) as a records request that is not "expressly required by this section."

BATFE claims that the demand letter was issued pursuant to § 923(g)(5) and 27 C.F.R. § 478.126. BATFE argues that the demand letter does not violate § 923(g)(1)(A) because the demand letter was issued pursuant to § 923(g)(5),

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[15] At the time the FFL received the demand letter, BATFE issued demand letters to each FFL associated with ten or more firearms traced to the FFL with short times-to-crime during a calendar year. BATFE records indicated that ten crime guns were traced to this FFL during 1999.

which permits BATFE to issue a demand letter to any FFL for any record information for any purpose, and thus a records request expressly authorized by § 923. BATFE further argues that § 923(g)(5) should be read in isolation because its language is unambiguous; therefore, any other statutory provision is inapplicable as a restriction on BATFE's authority to issue demand letters for FFL records. BATFE interprets § 923(g)(7) and 27 C.F.R. § 478.25a as setting forth an FFL's duty to respond to certain types of BATFE requests (requests in the course of a bona fide criminal investigation), arguing that neither provision is a limitation on BATFE's demand letter authority. Therefore, BATFE asserts that its demand letter is a lawful records request and it is entitled to summary judgment.

J&G counters that § 923(g)(5) cannot be read in isolation but must be interpreted in the context of the statutory framework. J&G argues that when read in conjunction with § 923(g)(1)(A) and § 923(g)(7), the demand letter authority provided for in § 923(g)(5) is not unlimited: if § 923(g)(5) authorizes BATFE to issue demand letters for record information for any reason, then the express limitations of § 923(g)(1)(A) and § 923(g)(7) on BATFE's authorization to access FFL records would be nullified.[16] J&G argues that, because BATFE is not requesting records in the course of a bona fide criminal investigation, BATFE's demand letter is an unlawful records request.[17] Thus, J&G claims that BATFE's

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[16] J&G also argues that § 926(a) limits BATFE's § 923(g)(5) demand letter authority. *See infra* note 24.

[17] J&G also argues that legislative history demonstrates that BATFE's statutory demand letter authority was intended as a tool to force uncooperative FFLs to comply with BATFE records requests in the course of bona fide criminal investigations. J&G further argues that BATFE's

demand letter authority may be used only to access the records of uncooperative FFLs in the course of bona fide criminal investigations. Therefore, J&G argues that BATFE should not be permitted to request J&G' s records by demand letter because J&G has previously complied with BATFE's records requests. Accordingly, J&G argues that BATFE is not entitled to summary judgment.

Turning to the text of the statute, if § 923(g)(5) provided BATFE with limitless authorization to issue a demand letter to any FFL for any record information for any purpose, then other provisions within § 923 and other statutory provisions would be "void," "insignificant," or "surplusage":

> [I]t is . . . clear that section 923(g)(5)(A) is not a limitless delegation of authority to [BATFE] to request record information. Section 923(g)(5)(A) does not explicitly state the purposes for which the Secretary may issue letters. Other provisions of the statute, however, make clear that section 923(g)(5)(A) cannot be construed in an open-ended fashion. For instance, section 923(g)(1)(A) provides that FFLs "shall not be required to submit to the Secretary reports and information with respect to such records and the contents thereof, *except as expressly required by this section."* 18 U.S.C. § 923(g)(1)(A)(emphasis added).

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administrative history demonstrates that BATFE has historically issued demand letters only to uncooperative FFLs. However compelling, the unambiguous language of § 923 precludes the Court from considering legislative history. *See* discussion *supra* pp. 7-8.

> Section 923(g)(1)(A)' s express limitation on the Secretary's authority would be nullified if section 923(g)(5)(A) were interpreted to permit the Secretary to issue demand letters for any purpose. . . . Congress clearly did not intend such a result.

RSM II at 67 (emphasis in original); *accord Blaustein I* at 542.

Indeed, the *RSM II* court expressly refused to "delineate the precise scope of BATF[E]'s authority to issue [demand] letters to FFLs" and explicitly stated that its "holding [was] a limited one." *RSM II* at 67. The court then held that the challenged demand letter was "narrowly-tailored" to facilitate BATFE's statutory gun tracing responsibility and did not run afoul of the statutory framework because it was issued to a small number of FFLs who routinely failed to comply with BATFE trace requests in the course of criminal investigations and each FFL' s reporting obligations would terminate when the FFL ceased to hamstring BATFE in carrying out its statutory gun tracing functions. *Id.*

Neither of the *Blaustein* courts held that the challenged demand letter was "narrowly tailored" and thus permissible under the rationale of *RSM II.*[18] The *Blaustein II* court held

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[18] Both *Blaustein* courts noted that the challenged demand letter sought less information from the FFLs than the demand letter approved in *RSM II* but ignored the fact that the challenged demand letter was issued to a substantially greater number of FFLs (forty-one FFLs in *RSM II* compared with over 1000 FFLs in *Blaustein II)* and did not provide for automatic termination of the reporting requirements when BATFE determined that the FFL complied with the terms of the demand letter. *See Blaustein II* at 289 n. 17; *Blaustein I* at 545.

that § 923(g)(1)(A) only protects against reporting requirements not expressly authorized by § 923; thus, because § 923(g)(5) "expressly requires an FFL to produce record information when [BATFE] issues a demand letter," then § 923(g)(5) is an express requirement within the meaning of § 923(g)(1)(A). *Blaustein II* at 287-288. The court held, therefore, that § 923(g)(5) did not restrict BATFE to "issuing demand letters [only] in connection with a criminal investigation or to noncompliant FFLs." *Id.* However, the *Blaustein II* court simply did not address whether § 923(g)(1)(A) limited the demand letter authority of § 923(g)(5).[19] Therefore, because the court did not address this issue, *Blaustein II* provides little help for the purpose of construing § 923(g)(5) in the context of § 923.

The *Blaustein I* court construed § 923(g)(7) as merely "obligating FFLs to respond quickly to certain types of [BATFE] requests." *Blaustein I* at 543. The court held that § 923(g)(7) "in no way limits the types of requests that [BATFE] can levy on FFLs" under § 923(g)(5) and, therefore, "bears no relation to [BATFE's] power to issue demand letters." *Id.* (relying on *RSM II* at 66); *accord Blaustein II* at 287 n. 13. The *Blaustein I* court is correct that § 923(g)(7) establishes an FFL's duty to respond to BATFE when BATFE requests records in the course of a bona fide criminal investigation. § 923(g)(7) ("Each licensee shall respond immediately to . . . a request by the Attorney General for information . . . ."). Likewise, §

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[19] The parties did not dispute that BATFE was implicitly authorized to issue demand letters under § 923(g)(5). Instead, the parties disputed whether BATFE could issue demand letters for any purposes, as urged by BATFE, or whether other statutory provisions limited the demand letter authority, as urged by the FFL. The *Blaustein II* court's conclusion that § 923(g)(5) contains a condition precedent is a non sequitur.

923(g)(5) establishes an FFL's duty to respond to BATFE demand letters. § 923(g)(5)(A) ("Each licensee shall, when required by letter . . . , submit. . . record information . . . ."). [20] Just as § 923(g)(7) does not address the scope of BATFE's authority to issue demand letters, neither does § 923(g)(1)(A) expressly address the scope of BATFE' s authority to issue demand letters. However, although these provisions proscribe duties of an FFL, these provisions must be construed so that "no clause, sentence or word [is] superfluous, void, or insignificant." *Market Co. v. Hoffman,* 101 U.S. at 115. As recognized by the *RSM II* court, to hold that these provisions cannot limit § 923(g)(5) because they do not explicitly address BATFE's demand letter authority contravenes the statutory framework established by Congress.[21]

Indeed, the individual provisions of § 923 can be harmonized so that no clause, sentence, or word is superfluous, void, insignificant or surplusage. In short, the demand letter authority of § 923(g)(5) may be exercised by BATFE for any purpose authorized by § 923 but it cannot be extended to authorize demand letters for purposes prohibited by § 923. BATFE's demand letter authority may best be illustrated by a continuum.

At one end, BATFE is clearly prohibited from issuing demand letters to obtain records protected by the reasonable

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[20] Moreover, other provisions of § 923 also establish duties of FFLs. *E.g.*, § 923 (g)(1)(A) ("Each. . . licensed dealer shall maintain . . . records of . . . disposition of firearms. . . ."); § 923(g)(6) ("Each licensee shall report the theft or loss of a firearm from the licensee's inventory or collection. . . .").

[21] See discussion *supra* p. 12.

cause and warrant requirements of § 923(g)(1)(A); to construe § 923(g)(1)(A) otherwise would render the reasonable cause and warrant requirements superfluous. In addition, BATFE is prohibited from issuing demand letters for record information from FFLs "except as expressly required by [§ 923]." § 923(g)(1)(A).

At the other end of the continuum, § 923 expressly authorizes BATFE to issue demand letters to obtain record information which FFLs must report without a request by BATFE, *i.e.*, records pertaining to:

1. the disposition of two or more handguns to a non-licensee during any five consecutive business days under § 923(g)(3);

2. discontinuation of an FFL business under § 923(g)(4);

3. an FFL's lost or stolen gun under § 923(g)(6); or

4. FFL records requested by BATFE in the course of a bona fide criminal investigation under § 923(g)(7).

In addition, § 923(g)(1)(B)(i)-(iii) authorizes BATFE to inspect or examine an FFL's records:

1. in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the FFL;

2. to ensure compliance with FFL record keeping requirements; or

3. in the course of a bona fide criminal investigation. Whether the access circumstances authorized by § 923(g)(1)(B) are "express[] require[ments]" within the meaning of§ 923(g)(1)(A)'s prohibition is debatable. To be sure, § 923(g)(1)(A) forbids BATFE from requiring an FFL to report record information to BATFE unless expressly authorized by § 923; § 923(g)(1)(B) does not "expressly require" an FFL to submit its records to BATFE. On the other hand, § 923(g)(1)(B) expressly authorizes BATFE to access an FFL's records in certain circumstances; § 923(g)(5) could be construed as authorizing BATFE's access by demand letter inasmuch as § 923(g)(1)(B) does not identify the means by which BATFE obtains access to the records.

There are no other provisions within § 923 that either require an *FFL to report*[22] record information to BATFE or that permit *BATFE to inspect*[23] an FFL's records.[24]

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[22] *E.g.*, § 923(g)(1)(A) *("[D]ealers [FFLs]* shall not be required *to submit* to [BATFE] reports and information with respect to such records and the contents thereof, except as expressly required by this section." (emphasis added)).

[23] *E.g.*, § 923(g)(1)(A) *("[BATFE] may,* upon demonstrating [reasonable] cause before a Federal magistrate judge and securing . . . a warrant[,] . . . enter during business hours the premises . . . of any . . . licensed dealer . . . for the purpose of *inspecting or examining* . . . any records or documents required to be kept by . . . [the] licensed dealer. . . ." (emphasis added).

[24] Because § 923(g)(5) and § 926 were enacted contemporaneously, the statutory provisions must be read together. Although § 926(a) "does not directly foreclose [BATFE's] authority to issue the [demand] letter[,] . . . the statute does not grant [BATFE] an unbounded delegation of authority to request record information." *RSM II* at 66.

[S]ection 926(a) . . . clearly demonstrates Congress'

In this case, BATFE does not contend that it issued the demand letter to J&G as a result of J&G's disposition of two or more handguns within five consecutive business days, J&G discontinuing business, the theft or loss of a J&G gun, or to ensure J&G's compliance with FFL record keeping requirements. Therefore, the only statutorily authorized justifications for BATFE's demand letter must be either (1) a records request in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the FFL pursuant to § 923(g)(1)(B) or (2) in the course of a bona fide criminal investigation pursuant to § 923(g)(7) or § 923(g)(1)(B)(iii).

The evidence presented does not raise a material question of fact regarding whether the demand letter BATFE was issued to J&G in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the J&G or in the course of a bona fide criminal investigation. The demand letter states:

> The fact that you [referring to the FFL] had a

> concern about any attempt by [BATFE] to establish a national firearms registry. Section 926(a) would be rendered meaningless if [BATFE] could issue limitless demand letters under section 923(g)(5)(A) in a backdoor effort to avoid section 926(a)'s protections for law-abiding firearms owners. Congress clearly did not intend such a result.

RSM 11 at 67; *accord Blaustein I* at 542. Therefore, § 926(a) and § 923(g)(1)(A) are corollaries that limit BATFE's demand letter authority under § 923(g)(5): BATFE may only require an FFL to report its records as expressly authorized in § 923 and BATFE may not use any portion of the reported records to establish a national firearms registry.

> high number of traces of new crime guns with a short "time-to-crime" may mean that you are also selling a commensurate number of secondhand guns used in crime. [BATFE]'s National Tracing Center (NTC) usually only has information on a firearm's original retail sale, which is typically not as useful to law enforcement as the information on any subsequent sales. Absent information on subsequent sales, [BATFE] is not able to trace secondhand guns beyond the first retail purchaser and therefore cannot provide adequate investigative leads to police. Accordingly, this letter requires you to report certain information to the NTC about firearms obtained from non-licensees. This will allow us to better assist law enforcement.[25]

BATFE explicitly acknowledges that it sought to require J&G to provide record information so that BATFE could "better assist law enforcement" in its mission to provide adequate investigative leads in response to law enforcement gun trace requests. BATFE does not claim that the demand letter was issued in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the

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[25] In addition, the Administrative Record states BATFE intends to provide information obtained from demand letters to gun manufacturers and importers to "enable [them] to screen distribution of their firearms and discover for themselves whether any particular model of firearm they sell is frequently used in crime." Clearly BATFE is not authorized by § 923(g)(5) to issue demand letters for the purpose of collecting FFL record information for dissemination to gun manufacturer or importers.

J&G or in the course of a bona fide criminal investigation.[26] Notably absent from the record and the pleadings is any mention of a specific criminal investigation justifying BATFE's records request by demand letter.[27]

One could infer that BATFE intends to use the records requested from J&G in the course of future secondhand gun trace requests associated with criminal investigations. However, to allow BATFE to require FFL records for use in future criminal investigations would render insignificant §

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[26] Similarly, the *Blaustein II* court noted that BATFE "concedes that it is not seeking the information demanded in its letter in connection with a particular criminal investigation." *Blaustein II* at 287 n. 11.

[27] J &G devotes considerable effort to arguing the meaning of "crime gun" and "crime scene" in an effort to demonstrate that the Administrative Record is incomplete and does not allow determination of whether new gun traces associated with J&G during 2002 were conducted in the course of bona fide criminal investigations. J&G argues that if guns that were not "crime guns" from "crime scenes" were traced to J&G then those guns were not traced to J&G in the course of bona fide criminal investigations, and, therefore, BATFE's demand for its records is unlawful. The essential key to whether a gun is lawfully traced in the course of a criminal investigation is whether a law enforcement agency is conducting a criminal investigation, not whether the gun was used in the commission of a crime. Furthermore, whether guns traced to J&G were "crime guns" as defined by J&G is irrelevant because BATFE has failed to assert that the records requested by its demand letter were requested in the course of a criminal investigation. Moreover, although the Administrative Record conclusively uses the term "crime guns" when referring to gun traces without defining the term *(e.g.*, "firearms used in crime") the Administrative Record implicitly acknowledges that BATFE traces guns which are recovered by a law enforcement agency for purposes other than criminal investigations *(e.g.*, "A crime gun trace begins when a law enforcement official recovers a firearm, *usually* from a crime scene or from the possession of a suspect, felon or other prohibited person, and the law enforcement agency. . . submits a trace request to [BATFE]." (emphasis added)).

923's statutory text "in the course of" and "bona fide." *See, e.g., Duncan v. Walker,* 533 U.S. at 174. "In the course of" and "bona fide" must require more than a potential criminal investigation which may or may not be initiated in the future; thus, a BATFE records request must be tied to an actual criminal investigation.

BATFE's demand letter does not request J&G' s records in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the FFL or in the course of a bona fide criminal investigation. Therefore, because the demand letter is a request for FFL records which is not expressly required by § 923, the demand letter is an unlawful request for records. Consequently, BATFE is not entitled to summary judgment with respect to J&G's first count. Conversely, J&G is entitled to judgment as a matter of law. *See, e.g., Portsmouth Square Inc. v. Shareholders Protective Committee,* 770 F.2d 866, 869 (9th Cir. 1985); *Cool Fuel, Inc. v. Connett,* 685 F.2d 309, 311 (9th Cir. 1982).

2. Violation of New Rule Prohibition of Transfer of Records to Federal Facility and Any System of Registration (Counts 2-3)

J&G claims that BATFE's demand letter to J&G is an unlawful records request because the demand letter is a new rule which violates § 926. J&G argues that the demand letter is tantamount to a new rule because it is a novel interpretation of 27 C.F.R. § 478.126. J&G argues that, because this new rule requires J&G to transfer its FFL records to BATFE, it establishes a secondhand gun registry in violation of § 926.

BATFE claims that the demand letter was issued

pursuant to § 923(g)(5) and 27 C.F.R. § 478.126. BATFE argues that, because the § 926 prohibitions apply only to rules or regulations issued after the date of enactment of § 926,[28] the prohibitions cannot apply to BATFE's demand letter to J&G. BATFE further argues that the demand letter is not a new rule because it immediately affects a particular recipient rather than prospectively affecting a broad class of individuals. Alternatively, BATFE argues that if the demand letter is a new rule, then the demand letter does not establish a firearm registration system because it requests only a limited set of information from a limited number of FFLs. Therefore, BATFE asserts that its demand letter is a lawful records request and it is entitled to summary judgment.

J&G counters that BATFE's new rule is not the demand letter but the significant revision of BATFE's interpretation of its demand letter authority. J&G argues that neither BATFE nor Congress ever interpreted BATFE's demand letter authority to permit BATFE to issue demand letters to cooperative FFLs for the broad scope of secondhand gun information requested by BATFE. J&G argues that by interpreting BATFE's demand authority to permit it to issue demand letters to compliant FFLs for any purpose *(i.e.*, not limited to uncooperative FFLS in the course of bona fide criminal investigations), BATFE significantly revised its prior interpretation of its demand letter authority. Thus J&G argues that BATFE's revision of its interpretation of its demand letter authority is, in effect, a new rule promulgated by BATFE in 2000 in circumvention of § 926(b)' s notice and comment requirements and thus requires J&G to transfer a portion of its records to the national BATFE

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[28] May 19, 1986.

office which will transfer the records to the local or regional BATFE office, which are facilities owned, managed, or controlled by the United States, in violation of § 926(a). Therefore, J&G argues that BATFE is not entitled to summary judgment.

By its plain language, the demand letter requires J&G to transfer a portion of its records to BATFE. BATFE intends to record the contents of those records at a government facility. Therefore, if the demand letter was issued pursuant to a *"rule or regulation* prescribed *after* the date of enactment of [§ 926]," then the demand letter would be prohibited by the unambiguous text of § 926. § 926(a) (emphasis added); *see RSM I* at 696. However, if the demand letter was issued under the authority of § 923(g)(5), then the demand letter cannot violate § 926 because § 923(g)(5) is neither a rule nor regulation.[29] *RSM II* at 66; *Blaustein II* at 288; *Blaustein I* at 543-544. Likewise, if the demand letter was issued under the authority of 27 C.F.R. § 478.126, the demand letter cannot violate § 926 because 27 C.F.R. § 478.126 is a regulation promulgated *before* enactment of § 926.

J&G contends that the demand letter is "a new agency policy [which] represents a significant departure from long-established and consistent practice that substantially affects the regulated industry" and, thus, "the new policy is a new substantive rule." However, nothing in the record presented by the parties supports the conclusion that BATFE had established a definitive and conclusive interpretation of its demand letter

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[29] In addition, § 923(g)(5) codified 27 C.F.R. § 478.126 and was enacted contemporaneously with § 926; therefore, § 923(g)(5) was not promulgated *after* § 926.

authority.[30] Therefore, the demand letter cannot represent a new substantive rule.[31]

Because nothing in the record supports the conclusion that the demand letter was issued to a rule or regulation promulgated by BATFE after May 19, 1986, the demand letter is not an unlawful request for records in violation of § 926(a) and BATFE is entitled to summary judgment with respect to J&G's second and third counts.

3. Violation on Appropriations Rider Prohibition of Consolidation of Records (Count 4)

J &G claims that BATFE' s demand letter is an unlawful records request because the demand letter requests records for the purpose of consolidating and centralizing secondhand gun records in violation of a BATFE appropriations rider, Pub. L. No. 106-554, 114 Stat. 2763 (2000), which prohibits BATFE from consolidating or centralizing FFL records to establish a national firearm registry.

BATFE claims that the demand letter was issued pursuant to BATFE' s statutory authority to permit BATFE to fulfill its tracing responsibilities. BATFE argues that the appropriations rider should not be construed to prohibit collection of records which would render the FFL record

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[30] While the legislative and administrative history J&G presents may be compelling, the unambiguous text of § 926 precludes its consideration. *See* discussion *supra* pp. 7-8.

[31] However, *cf supra* note 24.

reporting requirements of § 923 ineffective; the appropriations rider should instead be construed as prohibiting BATFE only from collecting all FFL records, not a portion of FFL records. BATFE further argues that the appropriations rider cannot be construed to prohibit BATFE from collecting record information from FFLs under its tracing responsibility. BATFE argues that the legislative history of the appropriations rider is irrelevant because § 923(g)(5)(A) is unambiguous and was enacted after Congress adopted the appropriations rider. Therefore, BATFE asserts that its demand letter is a lawful records request.

J&G counters that the appropriations rider allows BATFE to consolidate or centralize only those FFL records which are incidentally necessary to BATFE's statutory functions. J&G argues that demand letters to cooperative FFLs are unnecessary for BATFE to fulfill its tracing responsibilities because these FFLs already report required records. Thus, J&G argues that, because J&G has never been uncooperative with BATFE's tracing requests, the demand letter is unlawful and BATFE is not entitled to summary judgment.

The appropriations rider prohibits BATFE from expending any funds for "consolidating or centralizing, within [BATFE], the records, or any portion thereof, of acquisition or disposition of firearms maintained by Federal firearms licensees," Pub. L. No.106-554, 114 Stat. 2763 (2000).[12] "The

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[12] J&G offers legislative history to demonstrate that the appropriations rider was enacted by Congress in 1978 in response to (1) a regulation proposed by BATFE which would have required all FFLs to quarterly report their records of gun dispositions without disclosing the identity of nonlicensed transferees and (2) BATFE's argument that the statutory demand letter authority could be used to require FFLs to report

plain meaning of consolidating or centralizing does not prohibit the mere collection of some limited information. Both consolidating and centralizing connote a large-scale enterprise relating to a substantial amount of information." *Blaustein II* at 289; *accord RSM II* at 68. Therefore, the appropriations rider cannot prohibit BA TFE from consolidating or centralizing some FFL records. *See Blaustein II* at 289 ("Taken to its logical end, [the FFL's] argument would require us to strike down a demand letter requiring just one FFL to report to [BATFE] 'any portion' of record information as to one firearm. Although we would not hesitate to make such a ruling if we interpreted the plain language of the rider and the [Gun Control Act of 1968] to require it, we disagree with [the FFL's] reading of the rider.") Indeed, Congress expressly requires BATFE to collect certain FFL records as well as authorizes BATFE to collect other FFL records. *E.g.*, §§ 923(g)(3), 923(g)(4), 923(g)(6), and § 923(g)(7). Because the appropriations rider merely prohibits the *unauthorized* collection or consolidation of FFL records, the appropriations rider cannot prohibit BATFE from consolidating or centralizing FFL records which must be reported to BATFE or which BATFE is authorized to access.

The plain language of the appropriations rider does not support J&G's conclusion that BATFE is prohibited from collecting or consolidating an FFL's records if the FFL has cooperated with BATFE. Although the demand letter to J&G was not lawfully issued to J&G in the course of a bona fide

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partial record information so long as the identity of unlicensed transferees was not included. However compelling, the unambiguous language of the appropriations rider precludes the Court from considering legislative history. *See* discussion *supra* pp. 7-8.

criminal investigation,[11] the appropriations rider does not eliminate or invalidate BATFE's statutory authority to issue demand letters to an FFL inasmuch as BATFE is statutorily authorized to issue demand letters regardless of whether the FFL has cooperated with BATFE or not. *See Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 189-190 (1978)(stating "repeals by implication are not favored" and "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable"); *Firebaugh Canal Co.* v. *United States*, 203 F.3d 568, 575 (9th Cir. 2000) (holding that appropriations acts acted annually for thirty years conditioned, but did not repeal, related congressional action). Therefore, BATFE is entitled to summary judgment with respect to J&G's fourth count.

4. Arbitrary and Capricious Agency Action (Count 5)

J&G claims that BATFE's demand letter is arbitrary and capricious because the letter:

1. has no basis for alleging that "crime guns" seized from "crime scenes" were traced to J&G;

2. was based on fifteen gun traces per year to J&G without considering J&G's sales volume;

3. was based on fifteen gun traces per year to a particular FFL whereas previous demands were based on ten gun traces per year; or

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[11] *See* discussion *supra* pp. 11-18.

4. was based on the unsupported proposition that fifteen traces per year of new guns to a particular FFL is indicative of a high sales volume of used guns by that FFL.

Therefore, J&G argues that, because the demand letter has no basis in law and requires records which have no rational relationship to a bona fide criminal investigation, the demand letter is an arbitrary and capricious agency action by BATFE.

BATFE argues that its decision to issue the demand letter is amply supported by the Administrative Record. BATFE argues that, because the BATFE 2000 Report identified limitations in BATFE' s tracing system as well as a small percentage of FFLs that were responsible for over half of new gun traces with short times-to-crime, BATFE determined that FFLs with more than fifteen new gun traces with short times-to-crime could provide record information concerning secondhand gun transactions. BATFE argues that the partial record information obtained from these FFLs would partially resolve the limitations of BATFE's tracing system. BA TFE claims it traced sixteen new guns with short times-to-crime to J&G in 2000. BATFE asserts that the demand letter is reasonably based on the Administrative Record available to BATFE and is neither arbitrary or capricious. Thus, BATFE argues it is entitled to summary judgment.

J&G counters that the Administrative Record which BATFE relied upon was incomplete because the Administrative Record does not:

1. include sufficient information regarding gun traces associated with J&G which identify the law enforcement agencies requesting the traces or whether the traces were

conducted for bona fide criminal investigations. Therefore, the record does not allow the determination of whether "crime guns" were traced to J&G.[34] J&G argues that requiring it to provide FFL records unrelated to bona fide criminal investigations violates § 923(g)(7).

2. consider an FFL's sales volume in relation to the number of traces to the FFL. J&G argues that BATFE has publicly acknowledged that high traces may reflect nothing more than high sales volume.

3. identify the reason BATFE changed the threshold often traces per year to fifteen traces per year for purposes of determining which FFLs should received demand letters. J&G argues that the Administrative Record includes no information to justify changing the threshold.

4. include any facts providing a basis for BATFE's proposition that an FFL with a high number of new gun traces with short times-to-crime is likely to have a high volume of secondhand gun sales. J&G argues that the Administrative Record includes no information to justify this proposition.

J&G argues that, because the Administrative Record is incomplete, BATFE's demand letter is arbitrary and capricious and BATFE is not entitled to summary judgment.

When determining whether an agency's action is arbitrary and capricious under the appropriate APA standard of

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[34] *See supra* note 27.

review under 5 U.S.C. § 706,[35] the Court reviews the Administrative Record "already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 743-744 (1985); *Camp v. Pitts,* 411 U.S. 138, 142 (1973).

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the

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[35] 5 U.S.C. § 706 (2000):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

> record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Fla. Power & Light Co., 470 U.S. at 743-744.

J&G argues that the demand letter is an agency action which is arbitrary and capricious. BATFE does not argue that the arbitrary and capricious standard should not be applied to review of the demand letter.[36]

> To determine whether an agency violated the arbitrary and capricious standard, [the] court must determine whether the agency articulated a rational connection between the facts found and the choice made. The court is not empowered to substitute its judgment for that of the agency. As long as the agency decision was based on a consideration of relevant factors and there is no clear error of judgment, the reviewing court may not overturn the agency's action as arbitrary and capricious. The basis for the decision, however, must come from the

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[36] 5 U.S.C. § 706(2)(A). J&G argues in part that the demand letter is arbitrary and capricious because BATFE exceeded its statutory authority to issue demand letters. Because BATFE did in fact exceed its statutory authority, *see* discussion *supra* pp. 11-18, J&G may have asserted a claim under 5 U.S.C. § 706(2)(C).

> agency. The reviewing court may not substitute reasons for agency action that are not in the record. . . .
>
> Judicial review is meaningless, however, unless [the court] carefully review[s] the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors. Accordingly, [the court] must not rubber-stamp administrative decisions that [it] deem[s] inconsistent with a statutory mandate . . . .

Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Service, 273 F.3d 1229, 1236 (9th Cir. 2001)(quotations and citations omitted).

The Administrative Record makes clear that the BATFE 2000 Report identified a class of FFLs associated with a majority of gun traces with short times-to-crime. The Administrative Record also demonstrates that BATFE expressly acknowledged that this class of FFLs may be engaging solely in lawful activities. In addition, the Administrative Record shows that BATFE reasonably concluded that, because this class of FFLs provides the majority of information for new gun traces, this same class might also be a significant source of information regarding secondhand gun traces.

Regardless of whether BATFE traced a particular number of guns to an FLL during a particular time period or considered an FFL's sales volume, BATFE is statutorily

authorized - within the statutory limits[37] - to issue a demand letter to any FFL regardless of how many new guns BATFE traced to the FFL within a time period. Therefore, BATFE's decision to issue a demand letter to J&G cannot be considered an arbitrary and capricious agency action. *Accord Blaustein I* at 546 (demand letter construed as a "sound use of statutory authority conferred on the agency" because the facts were "well-supported in the Administrative Record").

Furthermore, J&G presented no evidence to conclude that BATFE did not consider an FFL's sales volume in relation to the number of new gun traces associated with the FFL. However, even if it were assumed that BATFE did not, J&G has presented no evidence to suggest that BATFE's conclusion was clearly erroneous or not supported by the Administrative Record, even if its conclusion might ultimately be incorrect, a point acknowledged by BATFE in the Administrative Record. *Accord Blaustein II* at 291-293 ("Although [BATFE's] assumption might ultimately be wrong, [BATFE] did not act arbitrarily or capriciously . . . ."). Moreover, BATFE's decision to increase the threshold for determining which FFLs would be issued demand letters from ten to fifteen gun traces per year further limited the scope of its demand letter program demonstrates that BATFE considered the factors relevant to its decision to appropriately tailor its demand letter 16 program.[38]

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[37] *See* discussion *supra* pp. 11-18.

[38] J&G fails to explain its objection to the heightened threshold. This is most likely because BATFE would have issued a demand letter to J&G under either threshold. Regardless, the Administrative Record, particularly Table 14 of the BATFE 2000 Report, provides ample justification for either threshold.

Therefore, BATFE is entitled to summary judgment with respect to J&G's fifth count.

5. Denial of Due Process (Count 6)

J&G claims that BATFE denied J&G's right to due process under the Fifth Amendment of the U.S. Constitution because the demand letter seeks to deprive J&G of its property interest in its records. J&G claims that the demand letter requires J&G to report its records without providing J&G notice of or the opportunity to challenge BATFE' s allegation that more than fifteen crime guns were traced to J&G during 2002.

BATFE argues that J&G has no property interest in FFL records it is statutorily required to maintain; therefore, J&G's lack of a claim of entitlement to the records precludes its due process claim. BATFE further argues that J&G is prohibited from asserting a due process claim because BATFE is entitled to FFL records in some circumstances. Finally, BATFE argues that even if J&G were entitled to assert a due process claim, due process is not lacking because (1) BATFE has imposed no sanction on J&G, (2) J&G is entitled to hearing and notice before BATFE imposes a sanction, and (3) the demand letter provides J&G with additional notice that failure to comply with the demand letter may result in sanctions imposed by BATFE. Therefore, BATFE argues it is entitled to summary judgment.

J&G counters that it has a property interest in its FFL records because (1) BATFE may obtain the records only under

the limited circumstances provided by § 923(g)(1)(A) and (B)[39] or (2) J&G creates and maintain its records using its own labor at its own expense. J&G further argues whether BATFE has imposed sanctions on J&G is immaterial because J&G would be deprived of its property interest when it provides records to BATFE. Therefore, J&G argues that BATFE is not entitled to summary judgment.

"No person shall be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. A claim of denial of due process must include deprivation of a constitutionally protected liberty or property interest. *Wright v. Rive/and,* 219 F.3d 905, 913 (9th Cir. 2000). A property interest exists only where there is "a legitimate claim of entitlement" to the property. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972) ("[A] person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it."). "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source . . . ." *Id.*

The fact that J&G maintains its records with its labor at its expense is irrelevant to the question of whether J&G has a recognizable property interest in its FFL records because J&G has a statutory duty to maintain its FFL records. The express purpose of statutorily requiring J&G to maintain its FFL records is to provide BATFE with access to those records as

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[39] J&G also claims that § 923(g)(1)(D) recognizes that BATFE is entitled to seize records only if the records are material evidence of a violation of law. However, § 923(g)(1)(D) applies only to licensed collectors, not FFLs.

authorized by statute. Therefore, J&G's claim that it has a property interest in its FFL records because it expended its efforts and finances to maintain the records is inapposite. *Cf United States v. Biswell,* 406 U.S. 311 (1972) (holding that BATFE's statutorily authorized warrantless search of an FFL's business and records and the seizure of unlawful guns did not violate the FFL's "justifiable expectations of privacy" under the Fourth Amendment). In addition, J &G acknowledges that § 923 entitles BATFE to J&G's FFL records under specified circumstances. Thus, J&G has presented no evidence to demonstrated that it has a legitimate claim of entitlement to its FFL records. Consequently, in the absence of a legitimate claim of entitlement, J&G has failed to show that it has a recognizable property interest in its FFL records. Therefore, BA TFE is entitled to judgment as a matter of law with respect to J&G's sixth count.

B. MOTION TO SUPPLEMENT J&G'S OPPOSITION

J&G seeks to supplement its opposition to BATFE's Motion for Summary Judgment with a declaration made by a former BATFE special agent in connection with several consolidated actions filed in the California Superior Court.

The Court may permit a party to supplement a pleading by "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented," provided that the supplement is given with "reasonable notice and upon such terms as are just." Fed. R. Civ. P. 15(d).

The declaration submitted by J&G cannot be considered by the Court when construing the statutes at issue

in this case and would unfairly prejudice BATFE because it is an extra-record submission of alleged expert testimony. Moreover, the declaration was made for purposes of litigation other than this case. Furthermore, the declaration is not a "transaction[] or occurrence[] or event[] which [has] happened since the date of the pleading sought to be supplemented" because the declaration was made on April 8, 2003, and not since J&G filed its opposition to BATFE's Motion for Summary Judgment on March 5, 2004. *See* Fed. R. Civ. P. 15(d).

IT IS ORDERED GRANTING IN PART AND DENYING IN PART Defendant's Motion for Summary Judgment (doc. 9-1). Judgment is entered in favor of Defendant with respect to Counts 2-6 of Plaintiffs Complaint.

IT IS ORDERED that judgment is entered in favor of Plaintiff with respect to Count 1 of Plaintiff's Complaint that the demand letter is an unlawful request for its FFL records outside the scope of BATFE's statutory authority. IT IS FURTHER ORDERED that Defendant is enjoined from seeking to enforce its August 4, 2003 demand letter issued to Plaintiff.

IT IS ORDERED DENYING Plaintiffs Motion to Supplement Opposition to Defendant's Motion for Summary Judgment (doc. 20-1).

DATED this 4th day of August, 2004.

/s/
Paul G. Rosenblatt
United States District Judge